AHMAD SAID

v.

NACHARAMAL D. SUBRAMANIAM SERVAI
KR. KT. SUPRAMANIAM & ORS.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[ORIGINATING SUMMONS NO. 221 OF 1985 & CIVIL SUIT NO. 22-18-86]
21 MAY 1989

LAND LAW: *Removal of private caveat - Sale and purchase agreement executed on 16 January 1951 - Application for extension of caveat filed some 34 years later - Fraud - Limitation period of 12 years.*

CIVIL PROCEDURE: *Application to strike out pleadings O. 18 r. 19(1)(a) of Rules of the High Court 1980 statement of claim filed some 12 years after the cause of action had arisen - Whether action was statute barred - Section 9(1) of the Limitation Act 1953 - Whether the allegations of fraud fell within s. 29 of the said Act - Exceptions.*

Two connected matters came before Judge. One was the originating summons No. 221/85 where the applicant Ahmad Bin Said applied for and obtained an order extending private caveat against one Chokkalingam. Chokkalingam applied to remove the caveat. The other was civil suit No. 22-18/86 which concerned the same land. This suit based on fraud by the defendants was filed by the said Ahmad Bin Said. In this matter, the said Chokkalingam being one of the defendants applied to strike out the pleadings and writ under O. 18 r. 19(1)(a) Rules of the High Court 1980.

The case of Ahmad Bin Said rested on an agreement dated 16 January 1951. The originating summons for extension of his private caveat was filed some 34 years later. The writ and statement of claim were filed in 1986, more than 12 years after the cause of action had arisen.

Since, in essence the action was for the recovery of land, the question was whether it was statue-barred by virtue of s. 9(1) of the Limitation Act 1953 which, *inter alia*, bars any action for the recovery of land after the expiration of 12 years from the date on which the cause of action accrued.

Held:

[1] This is an action for recovery of land and as such it falls within s. 9(1) of the Limitation Act 1953 which bars any action after the expiration of twelve years from the date on which the right to action accrued.

[2] The alleged acts of fraud, in point of time, took place well after the period limited for prosecuting the cause of action had expired.

[3] On the uncontested facts it did not appear that the plaintiff could bring himself within the exemptions set out in the Limitation Act 1953, O. 18 r. 19(a) was therefore applicable in this case.

[4] The application by Chokkalingam to strike the pleadings and the indorsement of his writ is allowed as the whole case of the plaintiff is statute barred.

[Order that the private caveat be removed with costs. Order that the statement of claim and writ be struck out with costs.]

Cases referred to:
Ponnusamy & Anor. v. Nathu Ram [1959] MLJ 86
Riches v. DPP [1973] 2 All ER 935
Metropolitan Bank Ltd. v. Pooley [1885] 10 App Cas 210

Legislation referred to:
Limitation Act 1953, ss. 6, 9, (1), 29
Rules of the High Court 1980, O. 18 r. 19, (1)(a), (a), O. 19 r. 2

For the plaintiff - Annamalai; M/s. Annamalai & Co.
For the defendants - Christie; M/s. Naughton Christie & Co.

JUDGMENT

KC Vohrah J:

Two connected matters came before me. One concerns originating summons No. 221 of 1985 where one Ahmad Bin Said applied for and obtained an order extending for one year a private caveat which he had lodged against land registered in the name of one Chokkalingam. Chokkalingam applied to set aside and also to remove the caveat.

The other matter concerns the same land. In this matter, Civil Suit No. 22-18-1986., Ahmad Bin Said by writ sued four defendants (who included Chokkalingam) and prayed for declarations to the effect that the transfer of the land by the first three defendants, beneficiaries of the estate of one Servai and co-proprietors of the land, to Chokkalingam, was null and void and requesting "specific performance" by the first three defendants of a written agreement entered into in 1951 between the first three defendant's predecessor in title, Servai, and himself, the plaintiff. Chokkalingam applied for an order that indorsement on the writ and the statement of claim be struck out under the provisions of O. 18 r. 19 and under the inherent jurisdiction of the Court.

I shall first deal with the originating summons. As was stated earlier Ahmad Bin Said obtained from the High Court an order extending his private caveat against the land for one year. This was on 20 July 1985. In his affidavit supporting the application he stated that by a written agreement executed on 16 January 1951 one Servai sold and he purchased the said land for RM800. Upon execution of the agreement he went into occupation of the land.

The agreement was exhibited in his affidavit and it showed, *inter alia*, that:

1. Servai had agreed that Ahmad Bin Said occupy the land immediately upon execution of the agreement;
2. that the land was in the name of one Harun who had died;
3. that Harun had agreed to transfer the said land to Servai before he died;
4. that Servai would take steps to obtain an order from the High Court, Alor Setar, to transfer the said land to Ahmad Bin Said within five months from the date of the execution of the agreement;
5. that if the transfer of the land to Ahmad Bin Said was not obtained within the five months stipulated, Servai shall refund the RM800 paid by Ahmad bin Said together with RM100 damages.

In his affidavit Ahmad Bin Said further stated that the land was eventually transferred to Servai but that before Servai could transfer it to him Servai died and that he, Ahmad Bin Said, had recently discovered that the land was on 20 February 1985 distributed to three

beneficiaries of the estate of Servai and that these 3 persons had fraudulently sold the land to Chokkalingam. Ahmad Bin Said averred that this transfer was fraudulent as Chokkalingam had all the while known that the land belonged to him.

Chokkalingam, in applying to set aside the order extending the private caveat, stated in his supporting affidavit that he was a *bona fide* purchaser for value of the said land without notice of Ahmad's rights. He denied there was fraud involved when he purchased the land.

Ahmad Bin Said filed an affidavit-in-reply repeating that Chokkalingam and the predecessors in title of the land acted fraudulently and in concert to deprive him of his rights in the property and he referred to the writ he was filing to prosecute his rights to the land.

At the hearing of the originating summons before me, Counsel for Chokkalingam relied on the disclosure in the first affidavit of Ahmad Bin Said that the latter rested his case on the agreement dated 16 January 1951 with Servai for his rights to the property. He argued that Ahmad bin Said had no rights on the land as whatever action he could have taken arose from that agreement and the cause of action was statute barred either under s. 6 or s. 9 of the Limitation Act 1953.

It is clear from the affidavit of Ahmad Bin Said that the agreement between him and Servai was made on 16 January 1951 and under the agreement the transfer of the land was postponed for another five months at most. This was some 34 years before he filed his originating summons for extension of his private caveat which he had lodged on the said land in 1984. It is clear to me that the allegations of fraud he made against Chokkalingam and the three predecessors in title related to the years 1984 and 1985 and the acts of fraud fell outside the limitation period of 12 years from 1951. It will be apparent why I say the limitation period is 12 years when I deal with the application in the civil suit. I therefore allowed the application of Chokkalingam to set aside the extension order and to remove the caveat.

In the affidavit-in-reply in the originating summons Ahmad bin Said referred to the writ that he was filing in respect of the said land.

In the endorsement of the writ and his statement of claim Ahmad Bin Said prayed for 2 declarations and for an order for "specific performance" of the agreement. The declarations sought for were that the transfer of the land by first three defendants (predecessors in title and co-proprietors of the land), to Chokkalingam, the fourth defendant, were null and void. He predicated his relief on the written agreement of sale of the property to him by Servai entered into between himself and Servai, now deceased, husband of the first defendant and father of the second and third defendants. He contended that the first three defendants had fraudulently transferred the land to the fourth defendant and that the fourth defendant fraudulently accepted a transfer of the same to defeat the plaintiff's rights under the agreement. Particulars of fraud were set out in the claim. In addition he prayed for the specific performance of the agreement by the first three defendants.

The statement of claim shows that although Servai had sold and the plaintiff had purchased the land, Servai had failed to transfer the land to the plaintiff in 1951. The writ and statement of claim were filed in 1986, more than 12 years after the cause of action against Servai, or when he died against the estate of the deceased, had arisen. The plaintiff instead slept over his rights.

The relief prayed for against Chokkalingam, the fourth defendant (the last successor in title to the land) and the first three defendants (the beneficiaries of Servai and predecessors in title of the land) and are in essence in the nature of a declaration that he was entitled to the said land and for the registration of the land in his name; it is an action for the recovery of land.

It is an action where the plaintiff is seeking to "obtain ... land by judgment of the Court: and being such a cause of action (see the ruling of Thomson CJ (as he then was) in *Ponnusamy & Anor. v. Nathu Ram* [1959] MLJ 86 at p. 87) it falls within s. 9(1) of the Limitation Act 1953 which, *inter alia*, bars any action being brought by any person to recover land after the expiration of twelve years from the date on which the right of action accrued to him.

The cause of action of Ahmad Bin Said, the plaintiff, arose when Servai did not transfer the property into his name; from the statement of claim it is clear the plaintiff was aware of it and there is no question about fraud by Servai or his agent relating to the non-transfer of the land or about fraudulent concealment by Servai or by any one else of the right of action which had accrued to the plaintiff. The only reason the plaintiff gave in his statement of claim for not prosecuting his right of action, apart from lodging a private caveat against the land in 1954 after Servai died and which caveat lapsed six years later, was that he could not trace the beneficiaries of Servai and this has no bearing whatsoever on the matter of fraud under s. 29 of the Limitation Act. The acts of fraud allegedly perpetrated by all the defendants, according to the statement of claim, took place in 1984 and 1985 relating to the vesting of the land in the first three defendants from the estate of Servai and to the sale of the land by the first three defendants to the fourth defendant, Chokkalingam. These alleged acts of fraud, in point of time, took place well after the period limited for prosecuting the cause of action had expired and clearly the plaintiff cannot avail himself of the provision of s. 29 of the Limitation Act 1953.

It is, to my mind, also clear from the statement of claim that the plaintiff cannot bring himself into exceptions under the Limitation Act which would have saved his cause of action.

Order 18 r. 19(1)(a) allows the Court to strike out any endorsement on a writ or a pleading on the ground that it discloses no reasonable cause of action and O. 19 r. 2 bars the considering of evidence on an application to strike out on this ground. Though no defence was filed raising the defence of limitation the cause of action as set out in the statement of claim is very clearly time barred and it is also clear that the defendants were relying on limitation as defence Counsel for the fourth defendant had indicated during the course of arguments. On the uncontested facts it did not appear that the plaintiff could bring himself within the exemptions set out in the Limitation Act O. 18 r. 19(a) could be therefore be used in this case. As was pointed out by Lawton LJ in *Riches v. DPP* [1973] 2 All ER 935 at p. 942:

> The object of Rules of Supreme Court O. 18 r. 19, is to ensure that defendant shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts. One of the uncontested sets of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is statute-barred and the defendant tells the Court that he proposes to plead the statue and, on the uncontested facts, there is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defence. The delivery of the defence occupies time and waste money;

> and even more useless and time-consuming from the point of view of the proper administration of justice is that there should have to be a summons for directions, and an order for an issue to be tried, and for that issue to be tried, before the inevitable result is attained. It seems to me that when that situation arises the comments of Lord Blackburn in *Metropolitan Bank Ltd v. Pooley* [1885] 10 App Cas 210 at 221 are applicable. He said that a stay or even dismissal of proceedings may 'often be required by the very essence of justice to be done'. The *White Book*, having called attention to that statement by Lord Blackburn, goes on to say that the object is to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation'. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackles will fall to the ground the moment the uncontested facts appear; and that is just this case.

In my view the whole case of Ahmad Bin Said was barred in 1963 and he had no leg to stand now. I allowed the application of Chokkalingam to strike the pleadings and the indorsement of his writ.

Thus, at the end of the hearing of the applications, in respect of the application of Chokkalingam under the originating summons I allowed his application with costs to set aside the order of the High Court granted to Ahmad Bin Said extending the private caveat lodged on the land and I ordered the caveat to be removed forthwith from the register. In respect of the application by Chokkalingam under the civil suit I allowed, with costs, his application to strike out the pleadings and the indorsement of his writ under O. 18 r. 19(1)(a) of Rules of the High Court 1980.

Also found at [1989] 2 CLJ 1192